

sentation"); Gary D. Terrell, 59 RR 2d 1452, 1454 (¶4) (Rev. Bd. 1985) ("carelessness and mistakes of law are entirely different matters from an intent to deceive").

663. Here, the errors in NMTV's applications were plainly the result of inadvertence rather than calculated deceit. The record establishes that the mistakes first arose during the preparation of the Odessa application, and were subsequently repeated in the Portland application because Odessa was used as a template. (¶¶263, 266 above.) Both Mr. May, who prepared the applications, and Dr. Crouch, who signed them, testified unequivocally that the errors were unintentional, and that they were first discovered during the course of this proceeding. (¶¶256, 264-266, 272 above.) The most significant two errors were the failure to identify TBN Assistant Secretaries Phillip Crouch and Terrence Hickey as Assistant Secretaries of NMTV, and the mistaken claim that NMTV's officers had not changed since the corporation's inception. (¶263 above.) At hearing, Mr. May acknowledged that these errors were a "big mistake and "a stupid error, frankly," and he explained that they were the result of oversights caused by the manner in which the applications were prepared by his office. (¶¶264-65 above.)

664. Although the omitted information concerned an aspect of NMTV's relationship with TBN, the record establishes that this information was correctly reported in other filings that were made with the Commission before that relationship was first

challenged at the FCC in a Petition to Deny filed in May 1991 directed against NMTV's application to acquire a station in Wilmington, Delaware. (§267 above.) Specifically, the record establishes that on six occasions during the six-year period before the Wilmington Petition was filed, either TBN or NMTV filed FCC Ownership Reports listing their common officers, including, at various times, Phillip Crouch, Terrence Hickey, Matthew Crouch, and Charlene Williams. (§267 above.) Additionally, the record shows that in its application to acquire the Wilmington station, NMTV clearly identified Matthew Crouch and Charlene Williams as Assistant Secretaries of both TBN and NMTV. (Id.) In a closely analogous situation where allegations were made of intentional concealment, the Commission observed that --

"all of the information which Pinelands and BHC purportedly attempted to conceal was on file in the separate ownership reports filed by other licensees. We think it highly unlikely that an applicant would intentionally withhold such readily available information, if it was, in fact, aware of such information." Pinelands, Inc. 7 FCC Rcd 6058, 6065, n. 28 (1992) (emphasis added).

Thus, the fact that ownership reports showing the parties' common officers were a matter of public record at the Commission before any challenge was made to TBN's relationship with NMTV conclusively dispels any notion that either party intended to conceal from the Commission the fact that they had officers in common beyond Dr. Crouch. Superior Broadcasting of California, 94 FCC 2d 904, 910 (Rev. Bd. 1983) (omission of material information deemed careless rather than misrepresentational

since the omitted information was "an open matter of public record" at the Commission); WGUF, Inc., 58 FCC 2d 1382, 1383 (Rev. Bd. 1976) (omission of decisionally significant information did not involve a deliberate attempt to conceal where the information was reported in other applications and ownership reports filed with the Commission); Mesabi Communications Systems, Inc., 57 FCC 2d 832, 834 (Rev. Bd. 1976) (no intent to mislead or deceive where applicant reported information in other applications filed with the Commission).

665. Likewise, the other errors contained in the Odessa and Portland applications provide no evidence of concealment. In this regard, NMTV's applications for translator stations in Sacramento and Cleveland were a matter of public record at the Commission, as were the applications in which NMTV certified a minority preference. Again, the fact that this information was readily available at the Commission plainly negates any prospect that these errors were caused by a willful intent to deceive. Intercontinental Radio, Inc., 98 FCC 2d 608, 639-40 (¶41) (Rev. Bd. 1984) (submission of inaccurate statement does not indicate an intent to deceive when accurate information previously supplied by party is "a matter of open Commission record"); Vogel-Ellington Corp., 41 FCC 2d 1005, 1011 (¶15) (Rev. Bd. 1973) (omission of material information did not evidence an intent to deceive where applicant testified without contradiction that he misinterpreted the application question and the omitted information was reported elsewhere in filings that had

been made with the Commission). Similarly, NMTV's use of assumed ADI TV household figures for its station in Poughkeepsie, New York, was inconsequential in view of the fact that at the time of its Odessa and Portland applications, it had a cushion of 39,389,840 and 36,854,040 ADI TV households, respectively, to remain in compliance with the Commission's multiple ownership rules. Moreover, Mr. May testified without contradiction that he discussed those figures with Mr. Glasser while the Odessa application was pending and was advised that they appeared to be satisfactory. (§271 above.)

666. The fact that the applications do not discuss other aspects of TBN's relationship with NMTV also provides no evidence of deceptive intent. Again, the record establishes that the parties relied in good faith on Mr. May to prepare and present the material that he thought was required under the applications. (§§257, 262 above.) In this regard, Mr. May unequivocally testified that Dr. Crouch has always made it clear to him that he should provide the Commission with all of the information that Mr. May felt was important or relevant concerning NMTV's relationship with TBN. (§257 above.) Similarly, Dr. Crouch testified that he relied on Mr. May's judgment concerning what information the Commission might require. (§262 above.) Mr. May testified unequivocally that although he was aware of the assistance TBN was providing to NMTV, it never occurred to him that those ties needed to be addressed in the applications. (§258 above.) Given the complexity of the Commission's multiple

ownership rules and its de facto control guidelines, neither Dr. Crouch nor Mrs. Duff can be faulted for relying on Mr. May to determine what information the Commission might have required concerning NMTV's relationship with TBN.

667. In any event, Mr. May has given undisputed testimony that he had a number of conversations with the Commission's processing staff while the Odessa application was pending concerning the involvement of Dr. Crouch and TBN. (§§259 above.) His uncontroverted testimony establishes that he advised the Commission that Mrs. Duff was employed at TBN, that NMTV intended to carry TBN programming, and that NMTV's financial certification was based on anticipated loans from TBN. (§§259-60 above.) The evidence also shows that those conversations resulted in an informal request from the Commission's staff that NMTV's Articles of Incorporation, Bylaws, and organizational documents be submitted for review. (§260 above.) Those documents, which were provided to the staff by Mr. May before the Odessa application was granted, included Bylaws which clearly indicated that Dr. Crouch as President was authorized to "generally supervise, direct and control the business and the officers of the corporation" and to "select and remove all agents and employees of the corporation" subject to the authority of NMTV's Board of Directors. (§§30, 260 above.)

668. Moreover, the record establishes that during the five year period before the Wilmington Petition was filed, Mr. May

and his office filed over 80 documents with the Commission showing Mrs. Duff's association with TBN. (§66 above.) Included were documents that identified her as Assistant to the President of TBN, that indicated she was in charge of TBN's EEO program, and that described her as both an employee of TBN and an officer and Director of NMTV. (Id.) Likewise, the fact that Mr. May and his law firm were representing both TBN and NMTV was readily apparent from numerous public filings that were made with the Commission prior to the Wilmington Petition. (§198 and n. 38 above.) Additionally, the fact that Mr. Miller was providing NMTV with engineering services was plainly evident from numerous filings that were made with the Commission prior to the Wilmington Petition. (§203 above.) During that same period, Mr. Miller's relationship with TBN was also a matter of public record at the Commission. (Id.) Given these abundant filings with the Commission -- which were a matter of open public record -- it is incomprehensible that Dr. Crouch, Mrs. Duff or Mr. May were seeking to conceal from the Commission TBN's relationship with NMTV. See, Pinelands, §664 supra; Superior, §664 supra; WGUF, §664 supra; Mesabi, §664 supra; Intercontinental, §665 supra; Vogel-Ellington, §665 supra.

669. In other cases where unauthorized transfers of control have not been accompanied by intentional deception, the Commission has typically imposed a forfeiture as the appropriate sanction. See, Silver Star, supra, 6 FCC Rcd at 6907 (\$20,000 forfeiture for transfer of de facto control absent intent to

deceive); Notice of Apparent Liability of Benito B. Rish, M.D., 6 FCC Rcd 2628 (1991) (\$10,000 forfeiture for unauthorized transfer of control), affirmed, Liability of Benito Rish, 7 FCC Rcd 6036 (1992); Brian L. O'Neill, 6 FCC Rcd 2572 (1991) (lack of intent to conceal unauthorized transfer warrants forfeiture rather than designation for hearing); Liability of Weston Properties XVII Limited Partnership, 8 FCC Rcd 8470 (MMB 1993) (affirming \$8,000 forfeiture for unauthorized transfer of control); Liability of Radio Moultrie, Inc., 8 FCC Rcd 104 (MMB 1993) (\$8,000 forfeiture for unauthorized transfer of control), affirmed, 8 FCC Rcd 4266 (MMB 1993) (good faith conduct merits reduction of forfeiture to \$1,000); Liability of Mountain Signals, Inc., 7 FCC Rcd 3970 (MMB 1992) (affirming \$10,000 forfeiture for unauthorized transfer of control); Liability of CanXus Broadcasting Corporation, 7 FCC Rcd 3874 (MMB 1992) (\$10,000 forfeiture affirmed where evidence suggested that licensee had also misrepresented facts to the Commission concerning its unauthorized transfer of control); Mr. Angel F. Ginorio, 9 FCC Rcd 698 (MMB 1994) (licensee notified of apparent liability for \$20,000 forfeiture in view of two unauthorized transfers of control).

670. In this case, however, there are mitigating circumstances that militate against the imposition of even a forfeiture. First, as discussed at ¶¶590-600 above, TBN's relationship with NMTV arose under a newly developed Commission policy that invited group owners to provide substantial manager-

ial, technical, and financial assistance but offered no clear guidance as to when such assistance would implicate the Commission's amorphous de facto control guidelines. Adding to the situation's complexity was the fact that TBN and NMTV are nonprofit, nonstock entities of the sort that the Commission has acknowledged do not fall within the framework of its traditional de facto control policies, which are themselves exceptionally complex. Adding further to the complexity was the fact that both entities were operating as nonprofit religious organizations where donative relationships between sponsoring and beneficiary churches are both customary and benign. (§§205-207 above.) Given the complexity and the lack of clear guidance as to the permissible boundaries of the parties' relationship, a monetary sanction would be inconsistent with Commission precedent. See, Fox Television, §660 supra; Rainbow, §660 supra.

671. Additionally, the record establishes that TBN's assistance enabled NMTV to develop two full power television construction permits that had previously lain fallow. (§§28, 31, 177, 181, 185 above.) Thus, TBN's actions actually served the public interest by facilitating the construction and initiation of new broadcast service to the public. George E. Cameron, supra, 56 RR 2d at 828 (§11) (minority shareholder's successful efforts to keep two stations on the air militated against his disqualification even though he had illegally assumed de facto control over the stations in flagrant disregard of an express prior Commission warning). See also, Pappas

Telecasting, Inc., ¶622 supra; WSTE, Inc., ¶622 supra. Moreover, the record shows that TBN's assistance fulfilled the underlying objectives of the Commission's minority ownership policy by giving minority individuals like Mrs. Duff, Pastor Espinoza, Pastor Aguilar, Pastor Hill, and Dr. Ramirez an opportunity for ownership in the broadcast media.

672. In sum, given the unusual and complex nature of this case and the mitigating circumstances noted above, even if a violation of Section 310(d) had occurred, no forfeiture would be warranted.

**c. Application of De Facto Control Policies
To Impose a Penalty in this Proceeding
Would Violate Statutory and
Constitutional Proscriptions**

673. As shown above, based on current Commission standards, no violation of Section 310(d) has occurred. (¶¶601-649 above.) Further, assuming arguendo a violation had occurred, based on current Commission standards no significant penalty would be warranted. (¶¶650-672 above.) Although it therefore is unnecessary to reach the profound constitutional and statutory implications that this proceeding otherwise would raise, a brief discussion of those matters is warranted because of their importance.

674. For a number of reasons, a finding of de facto control based on the circumstances presented in this proceeding

would violate various constitutional and statutory proscriptions. The First Amendment states:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S.C.A. Const. Amend. 1.

Emanating from that first "Bill of Right" are the following fundamental freedoms: (1) freedom of association, (2) freedom of religious exercise, (3) freedom of religious governance, and (4) freedom of speech and expression. Congress has augmented those rights with additional protective legislation. For example, enacted in November 1993 was the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §2000bb, 107 Stat. 1488 (1993), which in Section 3 provides as follows:

"(a) Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person

(1) is in furtherance of compelling governmental interest;

and

(2) is the least restrictive means of furthering that compelling governmental interest."

675. A finding of de facto control in this case would violate these constitutional and statutory protections. For example, the government cannot legally permit a party to take

advantage of the Commission's minority ownership policy because he thinks it would be a good commercial investment or would further the objectives of a community organization like SALAD, but not because he thinks it would help spread religious gospel. Dr. Crouch has the same freedom to associate with minority individuals who share his religious goals as a non-minority commercial businessman has to associate with a minority commercial businessman, or as a non-minority community activist has to associate with a minority community activist. For the government to pass judgment based on Dr. Crouch's religious beliefs and the religious beliefs of the minorities with whom he chooses to associate would violate constitutional and statutory protections of freedom to associate and freedom of religious exercise. See, e.g., Wooley v. Maynard, 430 U.S. 705 (1977) (freedom of association includes the right not to be forced either directly or indirectly by the state to associate with ideas or beliefs contrary to one's own); NAACP v. Alabama, 357 U.S. 449 (1958) (First Amendment affords a separate and distinct constitutional protection for freedom of association); Shelton v. Tucker, 364 U.S. 479, 486 (1960) (the right of free association lies at the foundation of a free society); Sherbert v. Verner, 374 U.S. 398 (1963) (the government cannot deny a benefit that is available to others based on a party's free exercise of religious belief); Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707 (1981) (a person may not be compelled to abrogate a First Amendment right to free exercise in order to

participate in an otherwise available public program); RFRA, 42 U.S.C. §2000bb, §3(a).

676. To cite another example, it would be unconstitutional for the state to premise a finding of de facto control on the fact that TBN provided financing and legal and technical assistance to NMTV at less than commercial market rates. The Supreme Court has held that "religious freedom encompasses the power of religious bodies to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." Serbian Eastern Orthodox Diocese v. Milivojeovich, 426 U.S. 696, 722 (1976) (emphasis added); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952). As Justice Brennan noted in his Concurring Statement in Corporation of Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos, 483 U.S. 327, 341 (1987), "religious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to: select their own leaders, define their own doctrines, and run their own institutions" (emphasis added). And, in Little v. Weurl, 929 F.2d 944, 948 (3rd Cir. 1991), the court similarly recognized that --

"Quite apart from whether a regulation requires a church or an individual believer to violate religious doctrine or felt moral duty, churches have a constitutionally protected interest in managing their own institutions free of government interference." (Emphasis added.)

677. Here, the record plainly shows that the principals of TBN and NMTV considered their internal organizational and

business relationships to represent the activity of one religious body sponsoring and helping another. (§§205-207, 223 above.) Under the circumstances of this case, to premise a determination of de facto control on the basis on which one religious organization has provided such assistance to another would infringe upon the constitutionally protected interest of two religious organizations in managing their own institutions free from government interference.

678. Likewise, a determination of de facto control based on the amount of TBN and local programming that NMTV broadcast would violate NMTV's First Amendment rights to free speech and free religious exercise. "Religious worship and discussion" are "forms of speech and association protected by the First Amendment." Widmar v. Vincent, 454 U.S. 253, 269 (1981). As the Court stated in Branti v. Finkel, 445 U.S. 507, 514 (1980):

"[the government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially his interests in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to produce a result which it could not command directly. Such interference with constitutional rights is impermissible."

See also, Perry v. Sindermann, 408 U.S. 593, 597 (1972); Regan v. Taxation With Representation, 461 U.S. 540, 545 (1983) ("the government may not deny a benefit to a person because he exercises a constitutional right"). Indeed, to cite the amount

of a licensee's religious and other network programming as a criterion for penalizing that licensee is to impose an unlawful prior restraint on free expression, because it forces a licensee not to broadcast "too much" of a certain type of programming. The Supreme Court has stated:

"Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." New York Times Co. v. U.S., 403 U.S. 713, 714 (1971), quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) ("The [Government] thus carries a heavy burden of showing justification for the imposition of such a restraint").

Indeed, the Commission has acknowledged the limited nature of its power, noting that it "has no authority and, in fact, is barred by the First Amendment and [Section 326 of the Communications Act] from interfering with the free exercise of journalistic judgment." Hubbard Broadcasting, Inc., 48 FCC 2d 517, 520 (1974). As Section 326 of the Act, 47 U.S.C. §326, succinctly states, "no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

679. In short, as the Supreme Court recently explained in Turner Broadcasting System v. FCC, ____ U.S. ____ (1994), 62 LW 4647, 4654:

"In particular, the FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations; for although the 'Commission may inquire of licensees what they have done to determine the needs of the community they propose to serve, the Commission may not impose upon them its private notions of what the public ought to hear.'"

680. The foregoing illustrations represent only the tip of the constitutional prohibitions that a finding of de facto control on the facts of this case would entail. Overriding the entire constitutional and statutory analysis are the paramount principles that (a) an application of law "subjecting the exercise of First Amendment rights to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional," Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969) (emphasis added); and (b) the government must "demonstrate" both a compelling interest and that it has used the least restrictive means available to it before it may consider abridging religious liberty rights. RFRA §3(b). Here, there are no narrow, objective, and definite standards to guide the profound curtailment of First Amendment rights that permeates this proceeding. Moreover, in the circumstances presented, no compelling interest has been demonstrated, and remedies far less restrictive than disqualification and forfeitures are available. (¶¶650-72 above.) Thus, a finding of de facto control and the imposition of any significant penalty would violate both constitutional and statutory proscriptions.

3. Abuse of Process Issue

681. Since NMTV is in fact a minority-owned and controlled company and no de facto control violation has occurred, a fortiori there has been no abuse of process. (¶¶601-49; 673-80

above.) Moreover, while the absence of a de facto control violation is dispositive of this issue so that no further consideration is necessary, even if a de facto control violation were found, the record falls far short of the established standards for finding an abuse of process. Accordingly, the resolution of this issue in TBF's favor is warranted in any event.

682. Abuse of process is an offense of deliberate intent. As the Commission has recently reiterated, "In an adjudicatory proceeding, a conclusion that abuse of process has occurred requires a specific finding, supported by the record, of abusive intent." Evansville Skywave, Inc., 7 FCC Rcd 1699, 1702, n. 10 (1992). The Commission's standard concerning abuse of process issues, which evolved in the context of unscrupulous and opportunistic renewal challengers, defines an abuse of process "as the use of a Commission process, procedure, or rule to achieve a result which that process, procedure, or rule was not designed or intended to achieve or, alternatively, use of such process, procedure, or rule in a manner which subverts the underlying intended purpose of that process, procedure, or rule." Policies and Rules Relating to Broadcast Renewal Applicants, 3 FCC Rcd 5179, 5199, n. 2 (1988).

683. Accordingly, in order to conclude that an abuse of process has occurred, a specific finding is required that the pertinent parties associated with NMTV and TBN had an abusive

intent to use a rule or procedure to achieve an unintended result or to subvert the underlying purpose of that rule or procedure. Here, the record establishes that NMTV and TBN have complied with and fulfilled, and have not subverted, the purposes of the minority lottery preference and multiple ownership policies. Moreover, even if it could be found that a failure to fulfill those policies may have occurred, any such failure was not the result "of deceptive or abusive intent necessary to sustain the conclusion that [NMTV and TBN] committed disqualifying misconduct." Evansville Skywave, Inc., supra, 7 FCC Rcd at 1701.

a. Minority Preference in LPTV Applications

684. As previously indicated (§11 above), at the time NMTV was formed in 1980 the Commission's process to issue low power and translator authorizations through a lottery procedure that included minority preferences did not exist. At that time, the Commission proposed to issue low power and translator authorizations based on a "paper hearing" process. During the ensuing years, the process by which those authorizations would be issued was in a state of flux. In November 1981, pursuant to Congressional legislation, the Commission proposed to resolve such applications through a lottery process that would award preferences to "groups or organizations or members of groups or organizations which are underrepresented in ownership of telecommunications facilities or properties," including minor-

ities, women, labor unions, community organizations, and other such groups. Random Selection/Lottery Systems, 88 FCC 2d 476, 484 (1981). In February 1982, the Commission declined to implement that legislation, Random Selection/Lottery Systems, 89 FCC 2d 257 (1982), and in April 1982 it proposed to award low power and translator authorizations through a process of paper and oral hearings. An Inquiry Into the Future Role of Low-Power Television Broadcasting and Television Translators in the National Telecommunications Systems, 51 RR 2d 476, 509 (1982). Later in 1982, after Congress enacted new legislation, the Commission proposed again to resolve low power and translator applications through a lottery process in which preferences would be awarded for minority ownership and diversity. Random Selection/Lottery Systems, 91 FCC 2d 911, 913 (1982). In May 1983, the Commission issued its Second Report and Order in Docket No. 81-768, note 46 above, in which it adopted that lottery process for the issuance of low power and translator authorizations. Random Selection Lotteries, 93 FCC 2d 952, 953 and n. 3 (1983).

685. In the course of creating this lottery process, the Commission specifically addressed the definition of minority ownership in the case of a nonprofit entity for purposes of minority preferences in low power and translator lotteries. In particular, when International Broadcasting Network ("IBN") requested the Commission in its low power television proceeding to clarify that definition, the Commission specifically directed

that "the definition of minority ownership in the case of a non-profit entity" claiming a comparative preference has "been established in the lottery proceeding." Inquiry Into the Future Role of Low Power Television Broadcasting and Television Translators in the National Telecommunications System, 53 RR 2d 1267, 1271 (1983). In that lottery proceeding, the Commission specifically stated "that nonstock corporations, as well as licensees operated by commissions, boards, or other governmental bodies should be judged as to minority status on the basis of the composition of the board." Random Selection Lotteries, supra, 93 FCC 2d at 977. The Commission continued that "[t]he same treatment should be afforded both nonprofit and for-profit nonstock corporations." Id. The Commission thus explicitly stated that the basis on which a nonprofit, nonstock corporation would be measured for purposes of a minority preference was the composition of the Board of Directors. The Commission then reaffirmed that determination when it issued its August 19, 1983 Public Notice setting forth the instructions concerning minority preference claims as follows:

"Minority Preference

* * *

3. Other entities will be entitled to a minority preference as follows:

* * *

c. Unincorporated associations or nonstock corporations with members. If a majority of the members are minorities, the entity is entitled to a minority preference.

d. Unincorporated Associations or nonstock corporations without members. If a majority of the governing board (including executive boards, boards of regents, commissions and similar governmental bodies where each board member has one vote) are minorities, the entity is entitled to a minority preference." Public Notice (Mimeo No. 6030), released August 19, 1983 (¶¶239, 241 above) (emphasis added).

686. In adopting this definition for the minority ownership preference, the Commission also made clear that its only interest was in the percentage of ownership interest, and not the degree of operational control. In this regard, the Commission held that the percentage interests held by limited partners would be counted toward qualification for the minority preference, as would the percentage interests held by the beneficiaries of trusts with the identity of the trustee deemed irrelevant. Id. at 976. Thus, pursuant to the Commission's pronouncement, a partnership whose limited partners included minorities holding more than 50% of the partnership interests would be entitled to the minority preference, even if those limited partners were entirely passive and the partnership was controlled by a non-minority general partner. Likewise, under the Commission's pronouncement, a trust whose beneficiaries included minorities who owned more than 50% of the beneficial interests would be entitled to the minority preference, even if the trustee who controlled the trust was not a minority. The Commission's focus on the percentage of interest, without regard to control, was based on the Commission's recognition when it adopted the minority preference for translator and low power

applications that "the functional characteristics" of such stations do not require "extensive involvement in the operations of a particular station by any individual, whether owner or owner's employee." An Inquiry Into the Future Role of Low-Power Television Broadcasting and Television Translators in the National Telecommunications Systems, supra, 51 RR 2d at 511. Indeed, since the minority preference would apply to applications for translators, and since translators by definition only repeat the signal of another party and employ no personnel, it would have been illogical for the Commission to apply a standard operating control analysis to claims for preferences in these services, and the Commission therefore clearly did not do so.

687. When NMTV was formed in 1980, TBN and NMTV obviously could not have intended to subvert the underlying intent of a lottery process that would not even exist until three years later. After the process was adopted, FCC counsel, Mr. May, advised Mrs. Duff and Dr. Crouch that NMTV qualified for the minority preference. (§238 above.) Mr. May's advice was based on and consistent with both the Second Report and Order and the August 1983 Public Notice and instructions, both of which stated that a nonstock, nonprofit corporation could claim the minority preference if the composition of its Board included a majority of members who are minorities. (§§239-42 above.) Before submitting NMTV's certifications, Mrs. Duff also reviewed the Public Notice and its instructions and concluded, based on the legal advice she had received and the language of the instruc-

tions, that since she and Pastor Espinoza comprised a majority of NMTV's Board, NMTV was entitled to claim the preference. (§§244-47.) Since the instructions setting forth the standard for claiming a minority preference did not change in the subsequent application forms on which Mrs. Duff claimed such preferences for NMTV, and since counsel reassured her that the certifications were proper, Mrs. Duff continued to believe that NMTV was entitled to a minority preference based on the fact that a majority of its Board of Directors consisted of minorities. (§§249-51.) NMTV's minority preference certifications in its low power applications were entirely consistent with the Commission's announced policy, and the submission of those certifications did not abuse that process. Moreover, even if, in the face of the Commission's plain language with which NMTV complied, those certifications were found to subvert the lottery process, NMTV clearly relied in good faith on the Commission's instructions and the advice of counsel, and no finding of abusive intent is warranted. Accordingly, there was no abuse of process in the filing of NMTV's low power television applications.

b. NMTV's Full Power Applications

688. NMTV's full power applications for the Odessa and Portland construction permits likewise complied fully with and, indeed, admirably fulfilled the goals of the minority exception to Section 73.3555 of the Commission's Rules. Those filings

therefore were not an abuse of process at all, and certainly did not involve the abusive intent that would be required to warrant disqualification. Evansville Skywave, Inc., supra.

689. As fully set forth in ¶¶590-600 above, the underlying purpose of the Commission's expansion of the multiple ownership limits regarding minority ownership was to encourage group owners to enter into joint ventures with minorities and to provide (a) financing and (b) management and technical expertise. The Commission therefore adopted the recommendation of the 1982 Advisory Committee Report that provided for "the established operator [to develop] the property" as a means of protecting its investment; this would encourage group owners to make such investments in minority-owned broadcasting and provide minorities "with management and technical support." (¶¶592-94 above.) The Commission implemented that recommendation by authorizing established broadcasters to hold a cognizable interest -- including significant involvement as officers and directors -- in the joint venture with minorities. (¶¶596-600 above.) Again, the goal was to encourage experienced broadcasters to provide financing by giving them positions of influence as a means to protect their investments, and to provide management and technical expertise which were otherwise unavailable to minorities. (Id.) The particular areas of expertise in which minorities were found to be in need included engineering, law, accounting, and finance. (¶¶592 above.)

690. Pursuant to that policy, TBN provided NMTV with financing and management and technical expertise. As a result, NMTV has activated two construction permits which had lain fallow, and those stations are now providing service to the public. (§§32, 622 above.) Minority programming, minority outreach, minority training, and minority hiring are thriving through NMTV's Portland station. (§81, 141, 188 above.) As indicated in §645 above, the minority ownership policy contains no requirement, nor could it constitutionally contain any requirement, that minority owners act in any particular way or accomplish anything at all that might be construed as minority-oriented. Metro Broadcasting v. FCC, supra. Nonetheless, NMTV has in fact done so. Its investment in its Portland studios, its instructions to Mr. McClellan about its goals to serve the minority community, and the station's implementation of those goals are exemplary. This is not a record of an abuse of the Commission's process; rather, it is a record of a laudable implementation of Commission policy.

691. Even if this effort to fulfill the goals underlying the minority ownership policy could somehow be deemed improper, much more would be needed to find a specific intent to abuse the Commission's process. The record in no way supports such a finding. As discussed above (§§651-56), given the complex interplay between a Commission policy that encouraged the provision of financing and technical expertise, the overriding spirit of charity that existed between two religious organiza-

tions, the Commission's acknowledged uncertainty about the way in which self-perpetuating Boards of nonstock corporations operate, and the acknowledged illusiveness of the de facto control requirements, the principals of TBN and NMTV had no responsible course other than to retain and rely on expert FCC counsel for guidance. They did so in perfect good faith.

692. Moreover, although the HDO disagrees with Mr. May's interpretation of the multiple ownership provisions, Mr. May did not have the hindsight of that ruling when he gave his advice. What he did have was the statement of a Commissioner who interpreted the rule as requiring even less minority involvement than Mr. May did. (§659 above.) Commissioner Patrick thought that the rule did not even require minority control, an interpretation that went much further than Mr. May's. (Id.) At the time it was given, Mr. May's advice was plausible and reasonable, and was consistent with the purposes of the Commission's action in encouraging group owners to provide financing and management and technical expertise to minorities.

693. In short, NMTV and TBN fulfilled the purposes of the minority ownership exception and, in any event, the filing of the Odessa and Portland applications was not the product of any abusive intent on their part. Accordingly, there has been no abuse of process, and TBF remains fully qualified to hold the license of WHFT(TV).